

May 31, 2019

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Via ECF Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation by Inovalon, Inc., Rules and Regulations
Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278**

Dear Secretary Dortch:

Pursuant to Section 1.1206 of the Federal Communication Commission's ("FCC") rules, the undersigned counsel hereby provides notice that, on May 30, 2019, Inovalon, Inc.'s Associate General Counsel, Kamyar Daneshvar, Senior Corporate Counsel, Anika Steffen, and Director of Operations, Philippe Fregeolle, and Venable LLP attorneys Daniel Blynn, Ian Volner, Liz Rinehart, and Meryl Nolan (collectively "Inovalon") met with Kurt Schroeder, Kristi Thornton, and Karen Schroeder in the Consumer & Governmental Affairs Bureau. That same day, Inovalon also met separately with Arielle Roth of Commissioner O'Rielly's office, Travis Litman of Commissioner Rosenworcel's office, and Michael Scurato of Commissioner Starks' office.

During the meetings, Inovalon urged the Commission to grant Inovalon's pending Petition for expedited declaratory ruling in the above-referenced proceeding (the "Petition").¹ In the Petition, Inovalon seeks clarification on two issues: (1) that faxes sent by the designee of a health plan to a patient's medical provider, pursuant to an established business relationship between the health plan and provider, requesting patient medical records are not "unsolicited" under the Junk Fax Prevention Act ("JFPA");² and (2) faxes that offer the free collection and/or digitization of patient medical records, and which do not offer any commercially available product or service to the recipients are not "advertisements." Inovalon is a leading provider of cloud-based platforms empowering data-driven healthcare. Inovalon's business includes, among other things, collecting health records from health care providers (e.g., doctors' offices) on behalf of health

¹ Inovalon, Inc., Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Feb. 19, 2018).

² Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

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care plans (e.g., insurers), in electronic and/or paper format, to analyze the data contained therein, and to identify and help resolve gaps in care, quality, utilization and compliance – all to further the goals of higher quality and more efficient care. Providers contractually agree to provide their patients' medical records to the plans, and the plans, in turn, delegate that collection function to Inovalon. Inovalon utilizes faxes to communicate with health care providers regarding records collection, as is common in the healthcare industry due to the sensitivity in sharing patient health information. Indeed, Inovalon's business model requires calling the health care provider prior to sending a fax to confirm the fax number and notify them of the forthcoming fax. This additional step is done to avoid any errant communications that may contain sensitive and personal patient health information under the penumbra of the Health Insurance Portability and Accountability Act ("HIPPA"). The only purpose of these faxes is to enable the recipients to easily and at no cost carry out their contractual duties to the health plans for whom Inovalon acts as an agent. Insofar as the fax at issue in the Fromer case is concerned, Inovalon itself offers no commercially available products or services to health care providers and, in fact, has no products or services that health care providers can purchase.

Inovalon is currently the defendant in litigation instigated by a single fax that it sent advising of the methods by which Eric B. Fromer Chiropractic, Inc. ("Fromer") (a health care provider and serial JFPA litigant) could meet its obligation to provide medical records to a plan with which it contracted. Inovalon offered nothing for sale or lease to Fromer, but merely informed the business that it could fulfill its contractual obligation at "no cost" to itself by using Inovalon's services. Nevertheless, because it offered Fromer a no cost way to comply with its contractual obligation to provide medical records, Fromer insists that it *ipso facto* was sent an unsolicited advertisement via fax in violation of the JFPA.

Fromer, the sole commenter in opposition to Inovalon's Petition, has misread the Commission's 2006 Order³ as conclusively establishing that all fax messages promoting no cost goods or services are per se unsolicited advertisements under the TCPA's definition.⁴ Contrary to

³ *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report & Order & Third Order on Reconsideration, 21 FCC Rcd. 3787 (April 6, 2006) (hereinafter "2006 Order").

⁴ Eric B. Fromer Chiropractic, Inc.'s Comments on Pet. for Expedited Decl. Ruling of Inovalon, Inc., at 1-2 (Mar. 26, 2018) (selectively quoting from the 2006 Order that "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition."). Surely Fromer must have meant to argue that such messages are merely "advertisements," because the exact same message – a fax promoting no cost goods or services – sent at a recipient's invitation could not possibly be considered an "unsolicited advertisement," even if it were *arguendo* an "advertisement" in the first instance. See also 2006 Order, ¶¶ 49-51.

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Fromer's belief, the 2006 Order did not state that "faxes offering free goods or services 'are' advertisements," full stop. If it had, then the Commission's discussion of "transactional" communications and "informational" messages that followed would have been entirely moot.⁵ The paragraphs dedicated to "transactional" and "informational" faxes in the 2006 Order are necessary precisely because those messages otherwise would have been swept up in a one-size-fits-all approach to any fax that contains information about free goods or services. It simply cannot be the case that all fax messages mentioning no cost goods or services are advertisements, let alone unsolicited ones. Thus, the crux of the issue presented by Inovalon's Petition is that the 2006 Order comes close but does not fully define the term "advertisement" for the specific purposes of the JFPA; nor does it articulate a clear explanation of why some messages promoting free goods and services are considered advertisements and others are not.

Faxes like the one underpinning the current litigation against Inovalon plainly fall within the umbrella of healthcare-related communications that need to be permitted and carried out without risk of class action litigation. For that reason, the Commission must make clear that the JFPA is simply inapplicable to faxes of the type that Inovalon and other service agents use in the healthcare field in order to enable the healthcare system to function efficiently and economically. As we discussed in our meetings, the pendency of Inovalon's petition for over 15 months has curtailed Inovalon from using engagement faxes of the type at issue here (*e.g.*, offers noting alternative methods of record retrieval to parties where an established business relationship exists). The chilling of a vital communication method in the healthcare industry has been detrimental to efficiency, a cost that will ultimately be passed onto consumers in the form of insurance premiums.

For the reasons discussed in its Petition and above, Inovalon respectfully requests that the Commission move quickly to grant its Petition and declare that faxes with no direct commercial purpose, and offering no commercially available products or services to the recipients, are not "advertisements" under the JFPA.

Respectfully submitted,



Daniel S. Blynn

Counsel to Inovalon, Inc.

cc: Kurt Schroeder

⁵ 2006 Order, ¶¶ 49-51, 53.

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Kristi Thornton
Karen Schroeder
Michael Scurato
Travis Litman
Arielle Roth
Jamie Susskind
Zenji Nakazawa